APPEAL NO. 92156

On March 26, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the claimant, (claimant), appellant herein, did not sustain an injury while unloading light poles for his employer on (date of injury), concluded that appellant's alleged injury is not compensable, and denied appellant's claim for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01. *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant requests that we review the record and the decision of the hearing officer and render a decision in his favor. Respondent, the employer's workers' compensation insurance carrier, requests that we affirm the decision.

DECISION

Finding the hearing officer's findings and conclusions to be supported by some evidence of probative value, and finding that those findings and conclusions are not against the great weight and preponderance of the evidence, we affirm the hearing officer's decision.

A "compensable injury" is defined in Article 8308-1.03(10) as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Appellant had the burden of proving that he was injured in the course and scope of his employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377, 378, (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R. J. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1987).

Appellant claimed he hurt his back while working for (employer), on (date of injury). Appellant testified as follows: On (date of injury), he was working for his employer as a journeyman electrician. On that day he and four other employees unloaded several parking lot poles from a truck. The poles were 30 feet long and weighed about 400 pounds. The first pole that was slid off the truck hit him in the neck. He immediately felt "pressure" in his neck and his upper back. Although his foreman, R B, was present, he did not tell him or anyone else about his injury when it happened. Appellant continued to help unload the rest of the poles. When the poles were unloaded, appellant and D N, who was an apprentice electrician assigned to appellant, went back to their work area. At that time he told D N "I think I hurt my back bad, D." Over the next several weeks D N did most of appellant's work for him because the injury dramatically decreased appellant's physical abilities. Appellant missed one day of work because of his pain, but told his foreman he had missed work because his truck broke down. Although appellant was aware that his employer's safety rules required immediate reporting of any accident, he continued not to report his accident to his foreman because he was worried about losing his job. On November 8, 1991,

appellant, D N, and another employee were laid off work due to a "reduction in force." On that same day appellant changed a tire on his truck without assistance. Three days later, on November 11th, appellant called the owner of the company, Mr. P, and reported his back injury. Mr. P told him to see a doctor. Appellant tried to see a doctor that afternoon, but was told by the doctor's receptionist that the insurance carrier would not pay for the visit. A few days later appellant began treatment with Dr. S. Medical records were not in evidence.

D N stated in his affidavit that he helped unload the poles on October 14th, that appellant told him the next day that moving the poles caused his back to bother him, and that over the next two weeks he did all the carrying and lifting on the job because appellant complained during any lifting activity.

J G and F M testified for respondent. They helped unload the poles. Appellant did not tell them he had hurt himself unloading the poles. Over the next few weeks they observed appellant doing his work and did not notice him having any physical problems or see anything that suggested to them that appellant was injured.

Appellant's foreman, R B, also testified for respondent. He said he saw and talked to appellant several times a day between October 14th and November 8th, and that appellant never told him about having had an accident. He did not notice appellant having any physical problem doing his work nor did he notice any decrease in appellant's work output during that period. Also, appellant never mentioned an injury during weekly safety meetings.

In considering a challenge to the sufficiency of the evidence, we recognize that the function of the hearing officer, as the trier of fact, is to judge the credibility of the witnesses, assign the weight to be given their testimony, and resolve any conflicts or inconsistencies in the testimony. *See* Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). We do not substitute our judgment for that of the hearing officer if the challenged finding is supported by some evidence of probative value and is not against the great weight and preponderance of the evidence. Alcantara, *supra*; Texas Workers' Compensation Commission Appeal No. 92122 (Docket No. WH-91-148810-01-CC-HO41) decided March 4, 1992. Applying these standards of review, we conclude that there was sufficient evidence of probative value to support the hearing officer's finding that appellant did not sustain an injury while unloading poles on (date of injury), and that such finding is not against the great weight and preponderance of the evidence.

We next consider appellant's complaint that respondent violated Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 141.1 which provides in part that all pertinent information in the parties' possession shall be sent to the Commission and exchanged with one another not later than 14 days before the benefit review conference (BRC). Appellant asserts that respondent violated this rule by not providing him with copies of written statements of certain employees prior to the BRC. Although we strongly encourage parties to comply with the provisions of Rule 141.1, and note that the rule provides that the benefit review officer may

reschedule a BRC upon a determination that pertinent information has not been submitted or exchanged, we find that noncompliance with that rule in the circumstances presented in this case (presupposing that respondent failed to comply with the rule) is not a sufficient basis for disturbing the hearing officer's decision for the following reasons. First, under the provisions of Article 8308-6.41(a) and Rule 143.3(a) an appeal to the appeals panel is an appeal of the benefit contested case hearing officer's decision, and is not an appeal of the benefit review officer's recommendation. Second, our review of the evidence is limited to the record developed at the contested case hearing. Article 8308-6.42(a)(1). Third, the written statements appellant refers to in his appeal were not offered or admitted into evidence at the contested case hearing. Fourth, it is clear that appellant's attorney had the statements at the contested case hearing because he used them in his cross-examination of respondent's witnesses.

Appellant attached numerous copies of documents to his request for appeal, some of which were made a part of the record developed at the contested case hearing and some of which were not. As previously mentioned, our review of the evidence is limited to the record developed at the contested case hearing. Article 8308-6.42(a); Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. HO-91-136258-01-CC-BC41) decided April 27, 1992. Consequently, we decline to consider those documents attached to the request for appeal which were not made a part of the contested case hearing record. We also note that appellant has not shown that the documents came to his knowledge since the hearing, that it was not owing to the want of diligence that they did not come to his knowledge sooner, that the documents are not cumulative, or that the information contained in the documents would probably produce a different result. *See generally* Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983).

As further grounds of appeal, appellant states that "I was stuck with an attorney I was not happy with," and that he attempted to "terminate" his lawyer, but the hearing officer told him it was "not a good time to change lawyers." We have searched the record in vain for any indication that appellant expressed to the hearing officer a desire to change attorneys, or that if he did, that the hearing officer took any action whatsoever that would have deterred appellant from changing attorneys. Appellant's complaint is without support in the record and does not constitute grounds for disturbing the decision of the hearing officer.

Appellant also asserts that the hearing was being "rushed through." We are satisfied from our review of the record that appellant was provided ample opportunity to present his entire case, including submission of all evidence he elected to introduce at the hearing. Furthermore, there is no indication in the record that appellant desired or requested more time than he took to present his case, and, in fact, declined to present rebuttal evidence when the hearing officer offered him the opportunity to present such evidence.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge